NO. 21081

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HENRY ROY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

The appellant, Henry Roy, was indicted by the Federal Grand Jury for the Central Division of the Southern District of California on April 7, 1965. The indictment was brought under 26 U.S.C., Section 7201, and charged that the appellant willfully attempted to evade and defeat a substantial part of his Federal income tax liability for the calendar years 1958, 1959, and 1960. The indictment charged that appellant understated his taxable income by $81,887.60, $113,861.07, and $158,535.21 for the respective years. The indictment charged that appellant's understatement of his taxable income resulted in an additional Federal

income tax liability for the three years in the amount of $52,206.39, $77,182.73 and $115,497.70.

On April 26, 1965 appellant pleaded not guilty to all three counts. The case proceeded to trial before the Honorable Charles H. Carr on March 15, 1966, and was concluded on March 17, 1966. The Court found appellant guilty of all three counts of the indictment [C.T. 27]. 1/

The appellant timely moved for a new trial, or in the alternative for a judgment of acquittal [C.T. 8]. Both motions were denied by the Court. On May 2, 1966, the appellant was sentenced to serve a period of six months in custody and to pay a fine of $30,000.00 [R.T. 652]. 2/

Appellant's Notice of Appeal was timely filed [C.T. 27-28].

The jurisdiction of the District Court was based upon Title 26, United States Code, Section 7201, Title 18, United States Code, Section 3231 and Rule 18 of the Federal Rules of Criminal Procedure. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294 and Rule 37(a) of the Federal Rules of Criminal Procedure.

1/ "C.T." refers to Clerk's Transcript of Record.

2/ "R.T." refers to Reporter's Transcript of Record.

II

STATUTE INVOLVED

The indictment was brought under 26 U.S.C., Section 7201, which provides in pertinent part as follows:

> "Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than five years, or both, together with the cost of prosecution."

III

QUESTIONS PRESENTED

A. Are there any conditions precedent to the Government's utilization of the bank deposits methods of computing a taxpayer's taxable income?

B. Was there sufficient evidence of wilfulness to sustain appellant's conviction under Title 26, United States Code, Section 7201?

STATEMENT OF FACTS

Appellant Henry Roy, an accountant and a former German attorney, began filing compensation and restitution claims for ex-German nationals in 1949 [Ex. 75, p. 7; R.T. 67]. Appellant filed claims under the German Indemnification Law on behalf of people who had been deprived of their professions, homes and property by the Nazi government.

Clients came to appellant's office in Los Angeles and generally signed a Power of Attorney permitting appellant to receive the award for the claimant [R.T. 78]. As his fee for filing these claims appellant received ten per cent to fifteen per cent of the amount awarded to the claimant. Appellant received the awards either directly from the compensation office in Germany or from a corresponding German attorney [R.T. 80]. If a corresponding attorney was needed to process a more difficult claim, this corresponding attorney received 50% of Roy's usual fee [R.T. 69].

After appellant received notice of an award he would write a letter to the compensation office stating that the particular amount should be transferred to an account in Berlin, or another European city [R.T. 81].

Appellant maintained two bank accounts in Berlin where fees were deposited, the Berliner Bank and the Berliner Disconto [R.T. 88]. The compensation awards were also deposited into a trustee account in Los Angeles. After the awards were deposited

into the Los Angeles trustee account, appellant would write a check to the claimants for the amount of the award less his fee [R. T. 108]. Approximately 98% of the awards forwarded from Germany were deposited into appellant's trustee account at the Security-First National Bank [R. T. 187]. After the client received his award and the amount in the trustee account reached $1,000, appellant had this amount transferred to his personal accountant account at the Security-First National Bank.

Between the years 1950 and 1956 appellant reported the fees earned from German compensation claims on his Federal Income Tax Returns as taxable income [R. T. 211], however, appellant's income tax returns for the years 1958, 1959 and 1960 failed to include these compensation fees.

Commencing in 1957 and continuing through 1960, appellant claimed only 30% of his total business expenses. Appellant stated to his secretary, Mrs. Lewin, that he would claim some of his business expenses in his German tax returns [R. T. 130, 134]. During the three years in question, 1958, 1959 and 1960, appellant never filed an income tax return in Germany or in any other country except the United States [Ex. 75, p. 23]. 3/ Had appellant claimed all of his justifiable business expenses for the years in question, he would have shown an operating loss for each of the years based on the income that he reported.

Appellant was first contacted by Internal Revenue Agent

3/ Refers to Exhibit 75, admitted into evidence.

Breese on April 29, 1960 [R. T. 208]. At that time appellant stated that he had income that he had not reported. Appellant listed various reasons why he did not include this unreported income on his Federal Income Tax Returns. The following are some of the reasons listed [R. T. 212]:

1. Appellant believed that the German Government might tax this money.

2. Appellant believed that he was practicing law illegally in the State of California, and if this word got back to his clients he could be sued for the return of the fees he had earned.

3. Appellant stated that he planned to file an income tax return at a later date with the German Government.

4. Appellant stated that he would report all of these fees in 1962 when his claims business terminated.

Appellant also stated that he felt that these awards were his own compensation and restitution for the wrong that had been done to him by the German Government. At a later date, appellant was asked why he had paid income tax on the fees which he had received for the years 1950 - 1956 if he felt it was non-taxable as restitution or compensation to him or why he at least did not file for a refund. Appellant replied that he did not do so because it was such a small matter [Ex. 75, p. 58].

During Revenue Agent Breese's first interview with appellant, Mr. Roy made available his cash receipts book which recorded among other things fees received from German compensation awards [R. T. 213]. During the course of several interviews with

the agents, appellant supplied them with deposit tickets, bank ledger sheets and a check disbursement ledger [R. T. 227].

On July 26, 1960, subsequent to his first interview with Revenue Agent Breese, appellant, through his attorney Edythe Jacobs, furnished the Internal Revenue Service with listings of his alleged total percentage fee receipts for the years 1957 through 1959 [Ex. 73]. At that time appellant claimed, however, that these fees were excludable from income for these past years. These listings, however, included only those percentage fees which had been paid by clients directly to appellant and those fees which had gone through one of appellant's trustee accounts in Los Angeles, and then into his public accountant accounts at the Security-First National Bank. There was no disclosure made in any of the listings of the existence of appellant's personal bank accounts at the Berliner Bank or at the Berliner Disconto Bank. Furthermore, no disclosure was made of the fact that thousands of dollars of percentage fees had been deposited into these accounts for appellant's benefit for the years in question by his German correspondent attorneys.

Special Agent James Donley first interviewed appellant on January 10, 1961 [R. T. 275]. At that time Agent Donley advised appellant that a criminal investigation was being undertaken and that appellant need not turn over any records or make any statements if he did not desire to do so. Appellant was also told that he could have an attorney present if he so desired [R. T. 277]. At this time appellant stated that one of his reasons for failing to report

the fees earned from the German compensation awards on his Federal Income Tax Returns was because some of these fees had to be refunded. Appellant stated that he had had to refund between 10% and 15% of the fees which he had earned by reason of the fact that the German Government had countermanded some of his client's claims [R. T. 278]. Agent Donley asked appellant if he would give the Agents a list of the countermanded claims or a list of the people whose claims had to be refunded. However, appellant never gave the agents a list of the fees that were countermanded by the German Government. During a subsequent examination of appellant's bank deposit records, Agent Donley was never able to find any indication that 10% to 15% of appellant's fees had been countermanded by the German Government [R. T. 330].

During this first interview with appellant, Agent Donley received from Mr. Roy a summary of cash receipts that had been deposited into appellant's personal business account at the Security-First National Bank. Appellant also gave Agent Donley copies of the cash disbursement records of 1956 through 1960. Appellant also turned over to Agent Donley some deposit tickets to appellant's personal accountant account [R. T. 279, 280]. Later that same afternoon, Agent Donley telephoned appellant and asked him if he used any work sheets in the preparation of his income tax returns. Appellant stated that he used no work sheets to prepare his income tax returns but that his returns were based upon his cash disbursement records or check records. Appellant further stated that from the records supplied to the agents they could re-construct the

returns exactly in the fashion that appellant had done so [R. T. 280, 281].

During this first interview between Agent Donley and the appellant, Agent Donley asked appellant whether he had any other personal accounts other than the account at the Security-First National Bank. Appellant responded that he had no other personal accounts whatsoever [R. T. 283]. On December 7, 1962, appellant accompanied by his attorney, Edythe Jacobs, appeared in the office of the Intelligence Division of the Internal Revenue Service. At that time appellant was asked whether he had any bank accounts whatsoever other than the two trustee accounts at the Bank of America and at the Security Bank in Los Angeles and his personal account at Von Der Heydt Kersten Sohne in Germany. Appellant responded that he had no other bank accounts whatsoever [Ex. 75, p. 32].

Appellant was asked by Agent Donley whether in connection with his claims processing business appellant used any corresponding attorneys or intermediaries in Germany. Appellant stated that he used none whatsoever [R. T. 298].

During the course of the investigation the agents prepared schedules of the deposits made to appellant's personal accountant accounts for the years 1956 through 1959. Appellant personally identified the sources of each deposit. Appellant supplied the agents with a sheet called a "Legenda" in which appellant identified the sources of the items deposited [R. T. 303, Ex. 46].

Appellant stated to Agent Donley that he had prepared his

income tax returns from the deposits that had been made to his personal accountant account at the Security-First National Bank. Appellant further stated that the totals that were shown on the spreads prepared by the Agents and which he had specifically identified totalled more than he had reported as taxable income on his tax returns. Appellant stated that the items shown on the spread prepared by the Agents were correct [R. T. 306].

On July 14, 1961, subsequent to appellant's first interview with Revenue Agent Breese, appellant filed his joint tax return with the Internal Revenue Service and as an attachment thereto appellant listed his alleged total percentage fee receipts for the year 1960 claiming such fees to be excludable from income. Appellant, however, included only those percentage fees which had been paid directly by clients to appellant and those fees which had gone through one of appellant's trustee accounts in Los Angeles, California. There was no disclosure whatsoever of the existence of appellant's personal bank accounts at the Berliner Bank or at the Berliner Disconto Bank, nor was there disclosure of the fact that thousands of dollars of percentage fees had been deposited into those accounts for appellant's benefit by his German corresponding attorneys in the year 1960.

On August 26, 1963, Agent Donley again interviewed appellant. At this time Agent Donley presented a photostatic copy of two bank accounts, one from the Berliner Bank and the other from the Berliner Disconto Bank, both in Berlin, Germany. At this time, appellant, after some hesitation, admitted that they

were in fact his accounts. Agent Donley asked appellant what items were deposited into these two German bank accounts. At first appellant stated that they were fees from a number of different special transactions. Agent Donley asked appellant to describe the kinds of transactions involved and finally appellant stated that they were fees [R. T. 312, 314]. Agent Donley asked appellant why he had never told the Agents about these foreign bank accounts when he had been asked about them before. Appellant stated that at the time he had been asked about them before there was a seizure placed upon these accounts by the German Government. Appellant further stated that the seizure took place in March or April of 1963. Appellant was first asked what bank accounts he had as early as Agent Donley's first intereview on January 10, 1961 and again on December 7, 1962.

At the time that Agent Donley presented the photostatic copies of the two Berlin bank accounts to appellant, Internal Revenue Agent Breese pointed out a notation appearing in the upper right hand corner of the account and asked appellant if he would translate it for the Agents. Appellant stated that the notation said "To be held for the benefit of Dr. Roy" [R. T. 313]. Agent Donley then asked appellant whether the notation was Dr. Roy's instruction to the bank to transfer certain funds out of those banks to bank accounts in Switzerland. Dr. Roy stated that was true [R. T. 314].

V

SUMMARY OF ARGUMENT

A. THE APPELLEE DID NOT ERR IN ITS USE OF THE BANK DEPOSIT METHOD OF COMPUTING APPELLANT'S TAXABLE INCOME.

1. Appellant Is Estopped From Challenging The Method By Which The Government Determined The Accuracy Of His Unreported Taxable Income Due To His Stipulation That He Had Received Unreported Receipts Equal To The Amounts Alleged In The Indictment.

2. There Are No Conditions Precedent To The Utilization Of Alternative Methods Of Computing Taxable Income.

3. The Appellee's Computations Of Appellant's Taxable Income Were Based On Adequate Books And Records.

B. THERE WAS SUFFICIENT EVIDENCE OF WILFULNESS TO SUSTAIN APPELLANT'S CONVICTION.

VI

ARGUMENT

A. THE APPELLEE DID NOT ERR IN ITS USE OF THE BANK DEPOSIT METHOD OF COMPUTING APPELLANT'S TAXABLE INCOME.

1. Appellant Is Estopped From Challenging The Method By Which The Government Determined The Accuracy Of His Unreported Taxable Income Due To His Stipulation That He Had Received Unreported Receipts Equal To The Amounts Alleged In The Indictment.

Prior to trial appellant stipulated to the correctness of the amounts alleged in the indictment. Stipulations Numbers 3, 4 and 5, as found on page 2 of the "First Stipulation of Facts and Exhibit Register", filed with the District Court on March 14, 1966, stated as follows:

> "3. That all of the exhibits listed herein, which purport to be photocopies of original records of the defendant, of the several banks where he held personal accounts or trustee accounts, records of stock brokerage accounts in the name of the defendant and his wife, or of Federal income tax returns as filed by the defendant may be received in evidence, without further proof of foundation, genuineness, or authenticity, in lieu of the original documents of which they purport to be copies; and that such

exhibits shall be deemed to be proof of the matter asserted therein.

"4. That each of the schedules listed herein and designated as having been prepared by Internal Revenue Agents, containing reconciliations and adjustments, summaries, listings, schedules or analyses, may be received into evidence without further proof of foundation, genuineness or authenticity, as being accurate and true as to the computations and representations of fact which they purport to contain.

"5. That with reference to the terms 'income' and 'taxable income' as may be used in this Stipulation and in any of the listed exhibits, except as in the defendant's income tax returns (i.e., Exhibits 1 - 5, inclusive) it is stipulated only that such amounts were received by the defendant and either reported or not reported on the defendant's income tax returns as shown in any such exhibit, and not to the legal conclusion that such monies were in fact 'income' or 'taxable income'."

The above quoted stipulations and the trial record clearly show that there never was any issue as to the amounts of money alleged in the indictment to be unreported. The only issues litigated were (1) the characterization of the amounts received as taxable or non-taxable and (2) whether the appellant wilfully intended to evade the payment of income taxes on the unreported receipts.

The potential danger arising from the Government's utilization of the bank deposit method of proof is that such a method of proof will not reasonably reflect the income of the taxpayer. United States v. Riganto, 121 F. Supp. 158, 161 (D. C. Virg. 1954). By stipulating to the correctness of the amounts alleged in the indictment appellant has removed this potential danger. Since the unreported receipts were received and deposited by the appellant as proven by the stipulations, the appellant could not possibly be placed in danger through the method used by the Government to determine such stipulations and conclusions.

Appellant makes the contention that his clients' cards, which he failed to produce at the trial, adequately and accurately reflect his income from his compensation business. Appellant did, however, stipulate as to the correctness of the amount of unreported receipts alleged in the indictment as proved by the bank deposits method. If appellant is not estopped from now challenging the correctness of those figures (for that is what he is now attempting to do by challenging the method of their computation) then surely appellant's failure to produce his clients' cards at the trial gives rise to the presumption that had these clients cards been examined they would have disclosed even a greater amount of unreported income than did appellant's cash receipts and cash disbursement records.

In a similar factual situation where the taxpayer asserted that the net worth method of computing taxable income was unwarranted unless his records were first shown to be totally

inadequate and where the taxpayer had possession of such records and yet failed to introduce them in evidence the 8th Circuit held that:

> "Here the rule may be invoked that the failure of a party to introduce evidence within his possession gives rise to the presumption that, if produced, it will be unfavorable to him."
>
> Hoffman v. Commissioner, 298 F. 2d 784, 788 (8th Cir. 1962).

If appellant's client cards had reflected less unreported income than did his bank deposits, then surely these cards would have been introduced in rebuttal to the Government's figures. The fact that the case at bar was a criminal tax fraud prosecution with the attendant burdens of proof, rather than a deficiency suit in the Tax Court should not preclude the operation of the presumption:

> "While, of course, the burden of proof does not shift in a criminal case, it is the rule that when the government establishes a prima facie case, it is then for the defendant to overcome the inferences reasonably to be drawn from the proven facts. Thus, evidence of unexplained funds or property in the hands of a taxpayer establishes a prima facie case of understatement of income, and it is then incumbent on him to overcome the logical inferences to be drawn from such proof. U. S. v. Hornstein, 7th Cir., 176 F. 2d 217, 220."

It is submitted that the only party that might have been injured by the Government's utilization of the bank deposit method of proving taxable income was the Government in that appellant's client cards might have reflected even a greater amount of unreported income with greater attendant tax liability.

2. There Are No Conditions Precedent To The Utilization Of Alternative Methods Of Computing Taxable Income.

There is no prerequisite to the use of circumstantial evidence in tax cases. The Government is free to use all legal evidence available to it. Holland v. United States, 348 U.S. 121, 132 (1954). It may, therefore, resort to a net worth or bank deposits method of proof without first proving the defendant's books and records to be inadequate; by the same token it may resort to such proof without a prior determination by the Revenue Service under Section 446, Internal Revenue Code of 1954, that the defendant's accounting methods do not clearly reflect income. Holland v. United States, supra, at page 132.

In the Holland case, supra, the Supreme Court considered and specifically rejected the rule contended for by appellant in the case at bar:

> "Petitioners ask that we restrict the Johnson case to situations where the taxpayer has kept no books. They claim that §41 of the Internal Revenue Code, expressly limiting the authority of the Government to deviate from

the taxpayer's method of accounting, confines the net worth method to situations where the taxpayer has no books or records or where his books are inadequate. Despite some support for the view among the lower courts (see U. S. v. Riganto, 121 F. Supp. 158, 161, 162), . . . citing other cases, we conclude that this argument must fail."

Holland v. United States, supra, at page 131 (Emphasis added).

All of the Circuit Courts of Appeal that have considered the Holland case have interpreted appellant's point unanimously. The reports are replete with holdings that there are no conditions precedent to the Government's utilization of the net worth or bank deposits method of proof.

In Hoffman v. Commissioner, supra, at page 786 (8th Cir. 1962), it was stated:

"The taxpayer insists that unless there are no records, or that the records are totally inadequate, or where there is a strong suspicion that the taxpayer has received income from undisclosed or illegal sources, the use of the 'cash expenditure' method of determining income is capricious, arbitrary and unwarranted. In view of Holland v. U. S., 348 U.S. 121, 130-132 . . . citing other cases, this argument may no longer prevail."

In Hargis v. Godwin, 221 F. 2d 486, 491 (8th Cir. 1955),

the 8th Circuit held:

"It is now well settled that the net worth method may properly be used even though the taxpayer's books are not inadequate."

To the same effect see:

Canton v. United States, 226 F. 2d 313, 322 (8th Cir. 1955);

United States v. Doyle, 234 F. 2d 788, 793 (7th Cir. 1956);

Davis v. United States, 226 F. 2d 331, 335 (6th Cir. 1955), cert. denied 350 U.S. 965.

Finally, it has been stated:

"The Holland decision makes it clear that there are no conditions precedent to the utilization of the net worth technique."

Davis v. Commissioner, 239 F. 2d 187 (7th Cir. 1956), cert. denied, 353 U.S. 984.

3. The Appellee's Computations Of Appellant's Taxable Income Were Based On Adequate Books and Records Specifically Identified By The Appellant.

Although the case at bar was labeled as a "bank deposit" case at the time of trial, appellee submits that the method of proof utilized by the Government was far different from that utilized in the classical bank deposits case. The Government did not rest its

case on the sometimes dangerous approximations and circumstantial inferences of a net worth or bank deposit computation. See Holland v. United States, supra, at pages 135, 136. In effect the Government's method of proof could well be termed "quasi specific item".

There can be no doubt that the figures relied upon by the Government were accurate because the characterization of the numerous items reflected in appellant's books respecting deposits to his personal account at the Security First National Bank were specifically identified by appellant as to amount and source [R. T. 306]. Furthermore, the agents accepted appellant's figures as correct [R. T. 327].

The testimony of Agent Donley indicates the records which appellant turned over for examination:

> "Q. Did you obtain any records at all from Dr. Roy while you were there, sir? (Referring to interview of January 10, 1961.)
>
> "A. Yes, sir, I did. I had explained to Dr. Roy that what we would like to do would be to reconstruct his income as filed on his returns, or in connection with that he gave me his -- it was a summary of cash receipts which -- not cash receipts exactly, it was a summary of receipts that had been deposited into his personal business account.
>
> "He also gave me -- this is for '56 through '60. He also gave me copies of the cash disbursement records, or check registers of '56 through '60.

"I believe he also gave us some deposit tickets to his personal account." [R. T. 279, 280].

While it is true that Agent Donley did request records from which to reconstruct appellant's income as filed on his returns, it is interesting to note that the records turned over showed income far in excess of the amount reported on appellant's returns. Thus, it was the appellant himself who specifically identified the amount and source of the bank deposits and it was the appellant himself who changed the Government's method of computation from one reflecting only circumstantial inferences to the method utilized by the taxpayer himself.

B. THERE WAS SUFFICIENT EVIDENCE OF WILFULNESS TO SUSTAIN APPELLANT'S CONVICTION.

To establish an attempted evasion of income tax liability wilfulness must be shown. This wilfulness involves a specific intent. The required specific intent may be inferred from the manner in which an individual handles his business affairs or from any conduct, the likely effect of which would be to mislead or to conceal.

Spies v. United States, 317 U.S. 492 (1943).

Direct proof of a defendant's intent to evade is rarely to be found. It may, however, be inferred from all the facts and circumstances attending the preparation of an understatement of net

income and tax by the taxpayer.

Spies v. United States, supra, at page 499;

United States v. Comerford, 64 F. 2d 28, 30 (2nd Cir. 1933), cert. denied, 289 U.S. 759;

Norwitt v. United States, 195 F. 2d 127, 132 (9th Cir. 1952), cert. denied, 344 U.S. 817.

In the case at bar appellee submits that the record discloses an abundance of conduct on the part of the appellant, the likely effect of which was to mislead the Internal Revenue Agents and to conceal large amounts of unreported income.

The following chronology of appellant's conduct should serve to illustrate his wilfull attempt to conceal income and the payment of taxes thereon.

1. From 1950 through 1956 appellant reported the percentage fees which he earned from his German compensation business on his federal income tax return. However, once his income from the compensation business reached into the 75% bracket appellant conveniently neglected to report these percentage fees as income.

2. On July 26, 1960, subsequent to appellant's first interview with the Internal Revenue Service, appellant, through his attorney Edythe Jacobs, furnished the Internal Revenue Service with listings of his alleged total percentage fee receipts for the years 1957-1959 [Ex. 73]. At that time appellant claimed that the percentage fees were excludable from income. The listings of the percentage fees, however, only included those percentage fees

which had been paid directly to appellant by clients and those fees which had gone through one of appellant's trustee accounts in Los Angeles, California, and then into his public accountant account at the Security-First National Bank. There was no disclosure made of the existence of appellant's German bank accounts or of the fact that thousands of dollars of percentage fees had been deposited into those accounts.

3. On July 14, 1961, appellant filed his joint income tax return and as an attachment appellant listed his alleged total percentage fee receipts for the year 1960. At that time appellant claimed that the fees were excludable from income for that year. The listing, however, again only included those fees which had gone through appellant's trustee accounts in Los Angeles, California. There was no disclosure made of appellant's German bank accounts or of the percentage fees that had been deposited into such accounts.

4. On May 10, 1962, while appellant was being interviewed by Agent Donley he was asked whether he used any corresponding attorneys in connection with his claims processing business. Appellant stated that he used none whatsoever [R. T. 298].

5. During the course of the investigation commencing on April 29, 1960, appellant steadfastly denied that he had any other bank accounts outside of his accounts in Los Angeles and at the Von Der Heydt Kerster Sohne in Germany. It was not until appellant was shown photostatic copies of the Berlin bank account ledgers on August 26, 1963, that he admitted that these were in fact his accounts. After admitting that these accounts were his appellant

was asked what items were deposited into those two Berlin accounts. Appellant replied that they were fees from a number of special transactions. After appellant was asked to describe the kinds of transactions he finally stated that the accounts contained percentage fees from the compensation awards.

Appellant was also asked to translate the notation appearing on the Berlin Bank ledger sheets. Appellant stated that the notation read "To be held for the benefit of Dr. Roy". Thereafter, through the prompting of Agent Breese, appellant admitted that the notation was an instruction to transfer those funds to a bank account in Switzerland.

6. During appellant's first interview with Agent Donley on January 10, 1961, appellant stated that one of the reasons that he failed to report his percentage fees as income was that 10% to 15% of these fees had been countermanded by the German government. During the course of the investigation Agent Donley was never able to locate any checks made payable to clients that were identified as being refunds because of countermanding orders [R. T. 330].

7. Appellant stated to Revenue Agent Breese during their first interview that one of the reasons that he failed to report his percentage fees as income was that he feared that he was practicing law illegally in California and that his clients could sue him for refunds of his fees. Yet Exhibit 72, admitted into evidence, is a letter from his attorney Edythe Jacobs wherein she stated that, as a result of inquiries made with the State Bar of California, she

did not believe that appellant was practicing law illegally or that it was necessary to be a member of the State Bar of California to represent persons before administrative agencies.

8. During the years in question appellant utilized only 30% of his justifiable business expenses. The reason for this was clearly that had all of his expenses been deducted, based on his reported income he would have shown an operating loss for the years in question. Furthermore, appellant told Mrs. Lewis that he would file an additional tax return with the German government because taxes were not so high there [R. T. 130-134]. During the years in question appellant never filed an income tax return in Germany.

VII

CONCLUSION

On this appeal appellant challenges the Government's utilization of an alternative method of computing the taxpayer's unreported taxable income, namely, the bank deposit method. However, it is apparent that appellant does not challenge the bank deposit method of proof for any of the time-honored and justifiable reasons, i.e., that the Government's proof did not reasonably reflect the income of the taxpayer and that the Government is relying on dangerous approximations and circumstantial inferences. This issue was taken out of the case prior to trial by virtue of appellant's stipulations as to the correctness of the amounts of

unreported income alleged in the Indictment.

The heart of appellant's appeal is directed toward the proposition that the Government's utilization of the bank deposit method generated a lengthy investigation during which appellant, of his own free will and volition made numerous false and fraudulent statements in an attempt to conceal income which he had failed to report on his income tax returns for the years in question.

Thus, it appears to be appellant's contention that the Government's method of proof was too thorough, that it uncovered too much. Appellant's argument would seem to prove too much. Should the Government be reprimanded because its investigation turns up over a quarter of a million dollars in unreported income? Certainly the Government is not limited to that method of proof which uncovers the least amount of unreported income and fails to expose a wilfull concealment of income.

The Government must be free to use all legal evidence available to it in determining whether a taxpayer has unreported income. Furthermore, the Government should not be precluded from the use of proper investigative techniques to determine whether there was a wilfull attempt to conceal income.

It must be noted that many of the false statements made by appellant in this case were made in the presence of his attorney. It was not the Internal Revenue investigation which generated appellant's damaging admissions. The statements were made subsequent to appellant's concealment of substantial amounts of unreported income. The statements were merely appellant's last

attempt to extricate himself from a situation which he had created for himself without the assistance of the Internal Revenue Service.

For the foregoing reasons, it is respectfully submitted that the judgment of conviction of appellant Roy should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Anthony Michael Glassman

ANTHONY MICHAEL GLASSMAN
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